In The

Supreme Court of the United States

October Term, 1976.

No. 76-1549

THE PEOPLE OF THE STATE OF NEW YORK,
Petitioners,

versus

KENNETH ARNOLD YARTER, JR.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

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The petitioner, The People of the State of New York, respectfully prays that a writ of certiorari issue to review the judgment of the New York State Court of Appeals entered in this proceeding on February 10, 1977.

Opinion Below

The opinion of Washington County Court dated July 2, 1975 which is unreported is set forth as Appendix B to this petition . The opinion of the

New York State Supreme Court, Appellate Division of the Third Judicial Department, a three -to- two decision, a copy of which is set forth as Appendix E to this petition is reported as People v. Yarter, 50 A D 2d 1019 (1975). The opinion of Washington County Court dated February 5, 1976, which is unreported, is set forth as Appendix F to this petition. The opinion of the New York State Supreme Court, Appellate Division of the Third Judicial Department, a copy of which is set forth as Appendix G to this petition is reported as People v. Yarter, 51 A.D. 2d 835 (1976). The opinion of the New York State Court of Appeals is set forth as Appendix I to this petition ans is reported as People v. Yarter, 41 N.Y. 2d 830 (1977).

Jurisdiction

The judgment of the New York State Court of Appeals which is sought to be reviewed was ent-

ered on February 10, 1977. The present petition for a writ of certiorari is being filed within ninety (90) days of the entry of said judgment.

The petitioners invoke the jurisdiction of this court under Title 28, United States Code, Section 1257 (3).

Questions Presented

1. At the suppression hearing, was there any evidence of any physical abuse or improper treatment of the defendant by the police?

2. Was there sufficient evidence to support the findings of the County Court that the defendant sustained physical injury while in police custody, and that his admissions were not voluntary?

3. Did the "totality of the circumstances" justify the suppression of the defendant's confession?

Constitutional Provisions Involved

United States Constitution, Amendment XIV:

"No State shall make or enforce any law which

shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, with due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement of the Case

A. History of the case.

Defendant-Respondent moved to suppress his confession which is set forth at Appendix A pursuant to Section 710.20 of the Criminal Procedure Law. A suppression hearing was held on March 31, 1975, April 1, 1975, April 2, 1975 and April 11, 1975, after which the Hon. Julian V. D. Orton, Washington County Judge rendered a decision suppressing said confession. Said decision is set forth as Appendix B.

District Attorney, Philip A. Berke, appealed said decision. In doing so he filed a certificate pursuant

to Section 450.50 of the Criminal Procedure Law that the deprivation of the use of the confession rendered the sum of the proof available to the People insufficient as a matter of law. Said certificate is set forth in Appendix D.

The Appellate Division, Third Judicial Department in an opinion set forth in Appendix E remanded the case to County Court for further findings as to physical abuse. Their opinion indicated that the County Court gave inordinate weight to the delay in arraignment.

Judge Orton rendered a decision set forth in Appendix F wherein he indicated that he could make no further findings regarding physical abuse. Said decision was affirmed by the Appellate Division, Third Department, in an opinion set forth in Appendix G and the New York State Court of Appeals in an opinion set forth in Appendix I.

B. Statement of facts.

On Monday, July 22, 1974 Susan Carmel Zanta, sixteen years of age, was missing from the camp of Mr. and Mrs. Robert Romph at Cossayuna Lake in the Town of Argyle, Washington County, New York, where she had been visiting. The New York State Police, as well as the Washington County Sheriff's Department, became involved in a missing person investigation to try to ascertain the whereabouts of Susan Carmel Zanta. Various people were questioned concerning information to try to determine the whereabouts of Susan Carmel Zanta. On Thursday, July 25, 1974 at approximately 3:00 P.M. the defendant-respondent was seen coming out of Beatty's Store at Cossayuna Lake by BCI Investigators Joseph Lewis and Robert Sandersen and was asked to accompany them a short distance away to the camp of Clifford Norman, who had allowed the State Police to use said camp as their Command Post. The defendant-respondent accom-

panied these two Investigators to the Command Post and was at the Command Post somewhere between 3:30 P.M. to 8:00 P.M. During this time he was interviewed by Investigator Sandersen as well as by BCI Investigator J.J. Phelan, and the defendant-respondent admitted to Investigator Sandersen that he saw Susan Carmel Zanta alone at the camp of his parents at Cossayuna Lake on Sunday Evening, July 21, 1974. The defendant-respondent further consented to a polygraph missing person situation test being given to him by Investigator Phelan. The test indicated that the defendant-respondent had information concerning the whereabouts of Susan Carmel Zanta.

The defendant-respondent was taken to the New York State Police Substation, Salem, New York by Investigator Joseph Lewis and Senior Investigator John Denio and was at the State Police Substation from approximately 8:30 P.M. to 11:00 P.M. on July 25, 1974. He was there questioned by Investi-

gators Lewis and Denio and admitted that he had made arrangements on Sunday Evening, July 21, 1974 with Susan Carmel Zanta to meet her the next day to give her a ride out of the area and that he further indicated that he would meet her at approximately 2:00 to 2:30 P.M. on Monday Afternoon, July 22, 1974 by Beatty's Store and that he first related to Investigators Lewis and Denio that he took her to Route 40 and that she was hitchhiking south on Route 40 and that she was going to Saratoga and then going to Montreal and subsequently he indicated to them that she was going to Schenectady to visit some friends. The defendant-respondent left the New York State Police Substation at Salem, New York with Investigators Lewis and Denio around 11:00 P.M. to go to State Police Headquarters at Loudonville, New York and on the way the Investigators stopped to pick up some sandwiches and they arrived at the State Police Headquarters at approximately 12:20 A.M. on July

26, 1974. The defendant-respondent was at State Police Headquarters from approximately 12:20 A.M. to approximately 4:30 A.M.

At approximately 2:00 A.M. the defendant-respondent was interviewed by BCI Investigator Donald R. Weise and from approximately 2:00 A.M. to approximately 3:00 A.M. made certain oral admissions to him, which he reduced to writing, and from approximately 3:00 A.M. to 4:00 A.M. the statement was typed out by Investigator Weise and was signed by the defendant-respondent before Investigators Phelan and Denio at approximately 4:30 A.M. Said statement is set forth as Appendix A.

At approximately 4:30 A.M. this defendant-respondent orally admitted to Senior Investigator Henry McCabe that he removed her clothing and had sexual intercourse with Susan Carmel Zanta and punched and struck her about the head and

knocked her to the ground and dumped her body in Cossayuna Lake and he was at that time charged with Murder in violation of §125.25, Subd. 3 of the Penal Law committed during the commission of the crime of Rape in the First Degree.

A little after 4:30 A.M. on July 26, 1974 this defendant-respondent went back to the Cossayuna Lake area with Investigators McCabe and Lewis and went to the site on Gordon Road where he had indicated he had sexual intercourse with Susan Carmel Zanta and had hit and struck her and he also went to Cossayuna Lake with Investigators McCabe and Lewis and pointed out where he had dumped her body.

Defendant-respondent then remained for somewhere between one to two hours with Investigators James Dyer and Robert Sandersen. He was then taken to the offices of Dr. Charles H. Cole by

Investigators Dyer and Sandersen and was examined by Dr. Cole at approximately 10:30 A.M. on July 26 in the presence of Investigators McCabe and Sandersen.

The defendant-respondent was thereafter taken by Investigators McCabe and Lewis to the Village of Greenwich to be arraigned before Greenwich Village Justice Loris Thompson and was arraigned somewhere between 11:00 and 11:30 A.M. He was then taken by Investigators McCabe and Lewis to the Washington County Correctional Facility in Salem, New York where he was admitted at approximately 12:30 P.M. by Deputy James McMorris.

The body of Susan Carmel Zanta was found on July 30, 1974 off the southerly side of the Kilmer Road, in the Town of Argyle, New York approximately six-tenths of a mile west of County Route 48, near Cossayuna Lake. She was brutally murdered with the body being in a nude condition and

and a half of a torn bra was found in her mouth. There were multiple fractures of the face and head which were comminuted and compounded.

The Defendant's Prior Involvement with the Police

The defendant-respondent had previously been arrested at various times by the police. At Page 704 of the transcript of the suppression hearing the defendant-respondent's attorney asked the defendant the following question: "Have you had previous problems with the criminal law involving sexual offenses?" The defendant-respondent answered "Yes Sir." The defendant-respondent further indicated that he was on probation at the time he was initially interviewed by the New York State Police. The defendant-respondent's attorneys brought a notice of motion for an Order precluding the prosecution from attempting to introduce testimony with regard to the alleged immoral acts and/or dispositions of criminal charges set forth in the record annexed to the affida-

vit of John L. McMahon, in support of said motion, on cross-examination of the defendant upon a trial should the defendant decide to testify in his own behalf. Attached to the Affidavit of Attorney McMahon was Appendix A, which is the Federal Bureau of Investigation report indicating prior arrests of the defendant-respondent. This report indicates that on October 17, 1968 the defendant-respondent was arrested for Rape in the First Degree which concerned a charge in Warren County, New York. This record further indicates that the defendant-respondent was arrested on March 18, 1972 for Assault with Intent to Commit Rape in Fort Lauderdale, Florida and that he was further arrested in Fort Lauderdale, Florida on July 5, 1973 for Grand Larceny. The defendant-respondent has further been arrested for additional sexual and other offenses by the police.

The arrest of the defendant-respondent on the early morning of July 26, 1974 by Senior Investigator

Henry McCabe was therefore not the first time that he had been arrested by the police and he had previously been involved with various police agencies.

C. How the federal questions arose.

The constitutional legality of the conduct of the police in interrogating the defendant, and the voluntariness of the defendant's confession were raised by the pre-trial motion to suppress the evidence. These constitutional issues were discussed at the suppression hearing. The issues were then passed upon and resolved in the respondent's favor by the County Court. (Appendix B). The County Court based its holding on the Fourteenth Amendment to United States Constitution as interpreted by court decisions. Upon the appeal from the County Court's decision, the issues were again raised in the briefs submitted to the appellate courts on behalf of petitioner and respondent.

The issues were then passed upon by the New York Supreme Court, Appellate Division, Third Judicial Department and resolved in favor of respondent (Appendixes E and G). The decision was predicated by the Fourteenth Amendment to the United States Constitution as interpreted by court decisions. Upon appeal, the issues were again raised in the briefs submitted to the New York State Court of Appeals. The issues were resolved in favor of respondent.

REASONS WHY A WRIT OF CERTIORARI SHOULD BE GRANTED

I.

THERE WAS NO EVIDENCE OF ANY PHYSICAL ABUSE OR IMPROPER TREATMENT OF THIS DEFENDANT BY THE POLICE

There was no witness who testified during the lengthy four day suppression hearing that they saw the police or any other person inflict any type of injuries on the defendant-respondent. The defendant-respondent was the only person who testified that he was hit by a uniformed officer in the fact at the New York State Police Substation in Salem on the evening of July 25, 1974 and further that he was beaten by four or five people at the State Police Headquarters at Loudonville on the early morning of July 26, 1974. The People called numerous police officers who had been involved with the questioning of the defendant-respondent and at the request of the defendant-respondent contacted other police investigators who came and testified

at the suppression hearing. There was absolutely no evidence produced at the hearing that would indicate that any police officer or any other person physically abused the defendant-respondent. Each State Police Investigator testified that at no time had he or anyone else in his presence used any type of physical force on the defendant-respondent or any type of duress, or threatened him in any way or made any promises to him. Furthermore, each of the State Police Investigators testified that they did not see any type of bruises, marks or contusions or any other injuries on this defendant-respondent and that he did not make any complaints of pain until after he had signed the written statement of confession on the morning of July 26, 1974.

Washington County Judge Julian V. D. Orton at no time made any determination that the State Police, or any other law enforcement agency, or person, physically abused the defendant-respondent and in

Judge Orton's decision of July 2, 1975 (B-8), it is indicated, "many claims made by the defendant are directly and firmly contradicted by prosecution evidence..." Judge Orton does refer in his decision (B-5) to the fact that the physician who initially examined the defendant found no significant wounds or injuries, while the jail physician and the defendant's physician found some evidence of injuries on his body. At no time during the hearing did any of the three physicians testify that any police officer caused any injuries to the defendant-respondent and the most that could be said on behalf of the defendant-respondent in this regard was that there was some testimony that the injuries which Dr. Young claimed he found could be consistent with many types of accidents. It should be noted there is testimony at the hearing that the defendant-respondent called in to his place of employment on Friday, July 19, 1974 and indicated that he could

not come to work because he had been involved in a water skiing accident.

Dr. Charles H. Cole testified at the suppression hearing that he examined the defendant-respondent at approximately 10:30 A.M. on July 26, 1974 and that Investigators McCabe and Sandersen were present during the examination. Dr. Cole had the defendant-respondent strip down and indicated that he found no marks, abrasions or contusions on the defendant-respondent during the examination and saw no types of bruises, marks or contusions or any other type of injuries on him. Investigator Sandersen indicated that he was present in the room throughout the entire examination and he observed the defendant-respondent and that he saw no bruises, marks or contusions on him. Dr. Cole indicated that this defendant did complain that he had pain in a certain area, and when he subsequently returned to that area that the defendant-respondent would not have pain in that area but a different area.

Both Dr. Cole and Dr. Lloyd Felmly, who is the physician in the Washington County Correctional Facility testified that at no time did this defendant-respondent indicate that he had been beaten by a State Police officer or any other police officer. The defendant-respondent also admitted this in his testimony.

At the suppression hearing photographs of the defendant-respondent taken by Senior Investigator Denio at the State Police Headquarters in Loudonville were introduced into evidence. There were additional photographs taken of this defendant by Deputy Sheriff James McMorris at the Washington County Correctional Facility when he was admitted at approximately 12:30 P.M. on July 26, 1974. The defendant-respondent in these photographs appears to be normal with absolutely no indication of any type of injury. At the suppression hearing the Washington County Correctional Sheriff's envelope on which was stated the defen-

dant's physical condition was admitted into evidence. Deputy McMorris testified that the condition of the defendant-respondent as written on the envelope on the line provided therefor was good, based upon his personal observation of the defendant-respondent.

Dr. William Young testified that at the request of the defendant-respondent's attorney that he examined him on Monday, July 29, 1974 and he felt that the injuries were anywhere from two to seven days old. Dr. Young testified concerning the injuries which he found and he indicated they were consistent with various causes. He stated, "they are not specifically from a beating". Dr. Young further indicated that any injuries which he claimed he found on the defendant-respondent could have been caused by his brother when he visited the defendant-respondent at the Washington County Correctional Facility on July 27, 1974 and could

have also been imposed by the defendant-respondent himself from either his bunk or cell bars or could have resulted from a water skiing accident which the defendant-respondent told his employer he had a few days prior to July 26, 1974.

The majority of the Court of the Appellate Division, Third Judicial Department in its decision of December 23, 1975 at Page (E-9) indicated that the Washington County Court "made no actual findings of fact one way or the other" on whether there had been physical abuse and remitted the case back to the hearing court "for the purpose of rendering written findings on the issue of whether the defendant was subjected to physical abuse."

Judge Orton in his decision of February 5, 1976 states (F-4), "The defendant's examination included testimony that he sustained physical injury during interrogation at Loudonville from abuse by four or five men out of uniform for a period of time. I did

not find, however, his recitation credible because of the conflict between his allegations and the testimony of the police officers. The police officers gave an accounting of the time elapsed during this period of interrogation which was not contradicted, and which was not consistent with the time required for this episode of abuse as testified to by the defendant which appeared to be an episode of some duration. Furthermore, the chronology of the testimony of the officers who testified was that at least one of them, not always the same person, was with the defendant at all times during this period. Finally, the defendant related definite physical mistreatment by the men out of uniform, and this testimony was not consistent with the doctors' testimony which did not reflect harsh trauma or severe injury to his body."

Judge Orton in his aforesaid decision of February 5, 1976 makes clear that he could not make his deci-

sion concerning the suppression of the written and oral admissions made by this defendant on physical abuse alone and he further makes clear that there was no specific evidence of physical abuse by the State Police.

The evidence clearly establishes, beyond any reasonable doubt, that the defendant was not physically abused, beaten, intimidated, threatened or coerced in any manner and that he received fair and proper treatment by the New York State Police on July 25 and July 26, 1974.

As a matter of law any confession obtained by the use of coercion upon an individual is inadmissable. Brown v. Mississippi, 297 U.S. 278,56 S Ct 461, 80 L Ed 682 (1936.) However, there is absolutely no evidence of coercion in this case.

II

IT IS CLEAR THAT THERE WAS NOT SUFFICIENT EVIDENCE TO SUPPORT THE FINDINGS OF THE COUNTY COURT THAT THIS DEFENDANT SUSTAINED PHYSICAL INJURY WHILE IN STATE POLICE CUSTODY AND THAT HIS CONFESSION WAS NOT VOLUNTARY

In this case Judge Orton made findings of fact totally unsupported by the evidence in the record. Initially, Washington County Judge Julian V. D. Orton found that certain oral and written admissions made by this defendant to the New York State Police on July 25 and July 26, 1974 should be suppressed on the basis of a long continued detention and questioning. Judge Orton made no finding as to whether there was physical abuse of the defendant as alleged by him. The Appellate Division, Third Judicial Department, in its decision of December 23, 1975, (E-9), found that Judge Orton gave "inordinate weight" to the delay in the arraignment following the defendant's confession and remitted the case to the County Court to make written findings on the issue of whether the defendant was subjected

to physical abuse.

Judge Orton in his decision of February 5, 1976 (F-4)indicated that he did not find the defendant's claim of beatings by four or five men out of uniform at the State Police Headquarters in Loudonville credible. Judge Orton pointed out that the police officers gave an accounting of the time that elapsed during the period of interrogation which was not contradicted and was not consistent with the time required for the beatings as alleged by the defendant. Moreover, Judge Orton found that the defendant's testimony of beatings was not consistent with the doctors' testimony which did not indicate harsh trauma or severe injury to his body. Judge Orton indicated in his decision that he could not make a finding of fact as to whether the State Police had physically abused this defendant. Moreover, Judge Orton in his decision(F-5) points out, "Evaluation of the evidence did not seem to warrant the application of the rule of cases finding abuse on the physical

evidence (see People v. Barbato, 254 N.Y. 170, where the physical symptoms were significantly present), especially when the People raised questions of other possible sources of the injuries." However, surprisingly Judge Orton then made a finding of fact that this defendant did sustain physical injury during the time he was in State Police custody on July 25 and July 26, 1974. This is wholly unsupported by any evidence in the record, and did not logically follow from Judge Orton's other findings of fact in his decision of February 5, 1976. The only evidence in the record that the defendant sustained injury while in State Police custody was his testimony that he was beaten, which Judge Orton specifically states,(F-4), "I did not find, however, his recitation credible...". There was some medical testimony that the defendant sustained physical injury but the testimony indicated that this injury could be consistent not only with a history of beating but also with other causes. Even the defen-

dant's own doctor, Dr. William Young, as well as Dr. Lloyd Felmly, indicated that the injury could be consistent with many types of accidents. Moreover, Dr. Charles Cole examined this defendant on the morning of his arrest and found no visible signs of any injury and indicated in essence that he was faking pain. Furthermore, all of the State Police officers that the prosecution had information that were involved in the questioning of this defendant were called to testify at the suppression hearing, and also arrangements were made by the prosecution to call other police officers that the defendant's attorney subsequently requested be present to testify at the suppression hearing and all denied having inflicted or witnessed any physical abuse upon the defendant. Furthermore, at the suppression hearing the defendant indicated that none of the officers that testified had inflicted injuries on him. Photographs were introduced that were taken of the defendant at the time he was arrested and finger-

printed on the morning of July 26, 1974 and at the time he was admitted to the Washington County Correctional Facility on that day, and none of the photographs indicated any type of physical injury to the defendant. Deputy James McMorris, who admitted this defendant to the Washington County Correctional Facility, noted on the defendant's admittance form that the condition of this defendant appeared good and that he had no complaints.

There is absolutely no evidence in the record to support Judge Orton's finding that the defendant sustained injury while he was in State Police custody. The Appellate Division, Third Judicial Department in its decision of February 19, 1976, in affirming the Suppression Order, was based solely upon the finding of Judge Orton that the defendant sustained physical injury while he was in the custody of the State Police. The Appellate

Division cited People v. Barbato, supra in affirming the decision (G-3) after Judge Orton indicated that the evidence did not warrant the application of the rule of cases finding abuse on the physical evidence as said rule is stated in People v. Barbato, supra ,(F-5). There are absolutely no conflicting inferences to be drawn from the proof as indicated from the transcript of the suppression hearing and the record clearly shows that there was no basis for the County Court's finding that this defendant sustained physical injury while he was in the custody of the New York State Police.

III

THE DECISION BELOW IS IN SHARP CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT CONCERNING THE ADMISSIBILITY OF CONFESSIONS; AS THE "TOTALITY OF THE CIRCUMSTANCES" DID NOT JUSTIFY THE SUPPRESSION OF DEFENDANT'S CONFESSION.

The detention of the defendant-respondent by the New York State Police in order to try to

ascertain the whereabouts of a missing person, Susan Carmel Zanta, was a proper and reasonable exercise of the police power in light of all the circumstances and the information which the police received from the defendant-respondent in their questioning of him. The detention of the defendant-respondent was not for an unreasonable period of time.

Any delay in the arraignment of the defendant-respondent did not, of itself, operate to exclude any admissions made by him during his prior detention and had absolutely no bearing on his prior oral and written admissions made to the police. Delay in arraignment is simply one of the circumstances surrounding a confession that is viewed in determining voluntariness. Ashcroft v. Tennessee, 322 U.S. 143, 64 S. Ct. 921, 88 L Ed. 1192 (1944). People v. Everett, 10 N.Y. 2d 500, 225 N.Y.S. 2d 193, 180 N.E. 2d 556 (1962), cert. denied 370 U.S. 963 (1962).

The Appellate Division, Third Judicial Department, found that Judge Orton gave inordinate weight to delay in arraignment. People v. Yarter, 50 A.D. 2d 1019 (1975).

The oral admissions and written statement made and given by this defendant-respondent to the police were freely and voluntarily made after he had been' properly advised of all of his Miranda Rights, and he consented to talk to the State Police. Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 694 (1966).

This defendant had had considerable prior experience with the police and said factor must be taken into consideration in looking at the "totality of the circumstances".

There was no evidence of any physical abuse of the defendant. The County Court Judge indicated that he could not make a finding of fact as to whether the State Police had physically abused this defendant. However, the County Court Judge then made a finding of fact that this defendant did sustain injury while in

police custody (F-3). This is wholly unsupported by any evidence in the record, and did not logically follow from Judge Orton's finding of fact. The only evidence in the record that the defendant sustained injury while in police custody was his testimony that he was beaten, which the County Court did not find credible (F-4). There was some medical testimony that the defendant sustained injury, but that this injury could be consistent with causes other than beating. There was no evidence of any physical coercion. Brown v. Mississippi, 297 U.S. 278, 56 S. Ct. 461, 80 L. Ed. 682 (1936).

The "totality of the circumstances" justifies the admissibility of the confession. Spano v. New York, 360 U.S. 315, 79 S. Ct. 1202, 3 L. Ed. 2d 1265 (1959).

CONCLUSION.

In view of the vital nature of the Federal constitutional issues presented in this petition, the petitioners respectfully submit that a writ of certio-

raria should issue to review the decision of the New York State Court of Appeals and the judgment below should be reversed.

Respectfully submitted,

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APPENDIX A

Confession of Defendant
July 26, 1974

"I, KENNETH ARNOLD YARTER Jr, being duly sworn deposes and says, I have been advised by Inv. DR Weise and J. Phalen that I have the right to remain silent, that anything I say can be used against me in a court of law, that I have the right to have an attorney present and if I can't afford one an attorney will be appointed for me. I understand my rights and do not want an attorney present at this time.

I am 23 years old and live at RD#1, Argyle, NY with my parents. We live in a trailer with an addition on it. I work at Someplace Else in Schuylerville, NY as a waiter.

Last Sunday SUSAN ZANTA was at my house. She was there with David Cole. The three of us watched TV. I don't remember what was on TV. It was in the evening. At about 8:00 PM, David and Susan left my house. At about 8:45 PM Susan came back alone

and we talked for awhile. Susan told me that she liked to smoke grass but about 10 minutes later David came back. Before David came back Susan and I set up a date to smoke. I told Susan that I would meet her up by Beatty's Store at about 2:00 or 2:30 PM the next day. The next day at about 2:00 PM I drove up to the store but Susan was not there. I drove up and down the street a couple of times. I had my 1968 Plymouth Fury two door. About the second or third time I drove by the store I saw Susan. Susan was wearing sandles, jeans and a black pullover top. I stopped the car and Susan got in. I drove to the east side on the lake and up a dirt road. The dirt road is across from the boat launch. It is about a five minute drive from where I picked her up. I drove up the dirt road about one half mile and pulled off in a field. The field is on the left side of the road going up. I had a silver hash pipe about

4 or 5 inches long. I had about a lid of grass in a baggie. Susan and I smoked about seven or eight pipes. We started necking and fooling around. I took her blouse and bra off. We were in the back seat of my car. We were kissing and I took her pants and underpants off. We started to make it. I had my shirt off and my pants down. I got into her and she started to yell. "Don't come in me" I said I wouldn't. I was laying down in the back seat with Susan on top. Susan jumped off and pushed the seat forward and got out of the door. She was naked. She grabbed her cloths off the front seat and started to yell that she didn't want to get pregnant, and she didn't know that we were going to go this far. She yelled that she was going to tell everybody what you did to me. She put her pants on and was yelling and screaming. I told her that she wasn't going to tell anybody and she said she was.

Then I hit her with my hand. I kept hitting her in the head and in the body. Susan fell down and the next thing I remember she was laying there. I thought I knocked her out. I picked her up and put her on a blanket in my trunk. I put her blouse, bra and sandels in the trunk with her. Then I left the field and drove to Argyle and picked up a birthday card for my brother. The reason I went to get a birthday card was I told my fiancee, that I had to pick up a birthday card so I would have a reason to leave the house when I went to meet Susan. After I got the card I stopped at my Grandmothers in Argyle. I stayed there 10 or 15 minutes. Then I went home. When I got to the house Tom Dibble was there. I think I got my hash pipe and grass out of there then. I flipped the pipe in the bushes next to where I park my car and I hid the grass under the left

hand front of the shed. Tom and I went to the beach at the Oaks. Tom and I met my fiancee and his wife at the beach. We drove to the beach in my fiancee's car. I left Susan in the trunk of my car. Tom and I stayed a little while at the beach and then Tom and I went fishing. We came back to my house at about 7:00 PM. We had supper and then played cards. At about 11:30 or 12:00 Midnight I went out and opened my trunk and carried Susan to my boat. I carried her over my shoulder. Susan was wrapped in a blanket. All her clothes was wrapped in the blanket with her body. I got in my boat it is a starcraft with a 10HP outboard. I took two cement blocks from by my fireplace in the yard and I took a couple round ankers from a couple of boat to the left of my boat. I took some rope from my shed. It was the rope I used to tie canoes down when we go canoeing. Then I rowed my boat out to the mid-

dle of the lake and tied the rope around the blanket and ran the rope through the cement block and through sandals and through the belt loops of her jeans. I tied the anchors to her ankles. One to each. I tied the blanket wround her head with the rope. The only thing that wasn't covered with the blanket was her hair and her ankles. Then I threw her body over the side. Then I rowed back in and went to bed. The next day I wiped some saliva out of my trunk. I didn't see anything in the trunk that needed to be washed and I didn't think it would be to cool for anybody to see me washing the trunk.

I have read the above statement and swear that it is all true to the best of my knowledge, I know what it means to swear to a statement and that swearing to a false statement makes me guilty of an additional crime.

Signed Kenneth A. Yarter Jr.

Witness:

Signed Sr. Inv. J.E. Denio

Signed Inv. J.S. Phelon

APPENDIX B

Opinion of Washington County Court
July 2, 1975

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff

against

KENNETH ARNOLD YARTER, JR.,

Defendant.

Before:

JULIAN V.D. ORTON
Washington County Judge

McMahon and McMahon
John L. McMahon
Attorney for the Defendant
Saratoga Springs, New York

Philip A. Berke
Washington County District Attorney
Granville, New York

JULIAN V.D. ORTON, J. The defendant, Kenneth Arnold Yarter, Jr., was indicted at the September, 1974 term of the Washington County Grand Jury on two counts of murder, rape in the first degree, and rape in the third degree under indictment #2359, and criminal possession of a controlled substance in the sixth degree under indictment #2360.

The defendant has moved pursuant to Section 710.20 of the Criminal Procedure Law of the State of New York to suppress written and oral statements made by this defendant to New York State Police Investigators and certain physical evidence obtained by them on the grounds that the statements were obtained in violation of defendant's constitutional rights and that the physical evidence is inadmissable under the "fruit of the poisoned tree" doctrine.

The defendant has presented motion papers and

a memorandum to the court and the District Attorney has presented responsive papers and there have been extensive hearings involving several days of testimony by numerous witnesses and the presentation of many exhibits and resulting in over 800 pages of transcribed record. After reviewing the papers, and hearing the testimony, and examining the exhibits and transcripts, this court finds that the written and oral statements of the defendant, Kenneth Arnold Yarter, made after the polygraph interview on July 25, 1974 and prior to his obtaining an attorney on July 26, 1974 and the physical evidence secured as a result of his statements directing the state police to specific physical evidence during that period should be suppressed and the motion is granted accordingly.

The defendant raised many issues concerning the totality of circumstances surrounding his

statements. He testified that several times during the defined custodial period he asked to be able to contact an attorney or have one contacted for him and that these requests were frustrated and he denied being advised of his "Miranda" rights. He raised an issue concerning the long period of his detention in various police controlled locations, without adequate rest or food and extensive questioning by many officers and claimed fatigue and a desire for an end to the interrogation which lead to his statements. He challenged the use of a polygraph as improper and complained of delay in arraignment and of physical abuse at the hands of the State Police. Finally, he pointed to the inconsistency of his statement with the physical facts surrounding the discovery of the body of Susan Carmel Zanta several days after defendant made his statement as an indication of the involuntariness he claims.

The testimony of State Police investigators was that the "Miranda" rights were properly given, no attorney was requested until arraignment, that there was no physical abuse, coercion, or promises made, and that defendant's requested needs were satisfied, and that after their conversations with defendant relevant to a missing person's case became a murder charge they arranged arraignment as quickly as possible.

A physician who examined defendant for the State Police prior to arraignment testified he found no significant wounds or injuries while the jail physician who examined the defendant the next day and a physician for defendant who examined defendant three days after his arrest testified they did find some evidences of injuries on defendant's body. Jail personnel also reported defendant's complaints of injury and their observations of certain marks on his body.

This court finds the basic facts to be that between 3:00 and 4:00 P.M. on July 25, 1974, the defendant was requested to accompany a state police investigator who was involved in the New York State Police investigation of the unexplained disappearance of Susan Carmel Zanta, age 16, on July 22, 1974, to the investigation command post near Lake Cossayuna, New York. The defendant agreed to go and was taken to a State Police command post in a private building controlled by the State Police and was asked to take a lie detector exam, which he did after being advised of his "Miranda" rights. This court also finds that he knowingly and intelligently participated in that examination. Thereafter, between 8:00 and 9:00 P.M. the defendant was transported to the State Police barracks at Salem, New York, and thereafter at about 11:00 P.M. he was transported to Troop G headquarters at Loudon-

ville, New York, and the record does not show defendant's clear consent to this continuing detention and transportation. The record is clear that after arrival at Loudonville, after having a sandwich and beverage, his only food during his state police custody before the written statement was obtained, defendant underwent extensive questioning which culminated in the preparation of and signing of a written statement at approximately four o'clock in the morning of July 26, 1974. After the statement was signed, defendant was charged with the murder of the missing girl. He was then held in the custody of the New York State Police and taken to various sites back again at the Lake Cossayuna area mentioned in his statement and otherwise was detained in automobiles except for a period of time when he was taken to a doctor's office for examination at State Police request. He was thereafter arraigned be-

fore a magistrate in Greenwich, New York at about noon on July 26, 1974. After arraignment, defendant was taken to the Washington County Jail where he complained of injuries the next day.

This court is impressed that although many claims made by the defendant are directly and firmly contradicted by prosecution evidence the record contains no clear uncontradicted prosecution testimony of voluntary participation by the defendant in the missing person investigation after the polygraph exam at Cossayuna. Further, the record shows the defendant was surrounded by police in police maintained automobiles and facilities for approximately eight hours after being taken from Cossayuna and for approximately an additional eight hours after signing the written statement in question. The second period of approximately eight hours was also the time

which elapsed between the time defendant was charged with the felony of murder and the time he was arraigned and the record contains no adequate explanation why that many hours were allowed to elapse between the arrest, after the statements were made, and arraignment, particularly where the record is clear some of those hours were spent sitting in a police car in a secluded area not far from the Washington County Jail or the magistrate's home and court room.

In evaluating a motion to suppress, the test for the court's evaluation is a consideration of the totality of the circumstances. (People v. Chafee, 42 AD 2nd 172).

When a defendant raises issues as to the voluntariness of his statements the burden of proof is on the people and the Court of Appeals of New York has provided that the trial judge must find voluntariness beyond a reasonable doubt to find

the challenged statement admissable. (People v. Huntley, 15 NY 2nd 72). Section 140.20 of the CPL requires arraignment without unnecessary delay. Delay in arraignment is a factor in consideration of the totality of circumstances (U.S. ex rel Rosner v. Warden, New York State Penitentiary, 329 F.S. 673).

After careful evaluation of all the circumstances presented of defendant's detention between the time of his entering into the investigation at Beatty's store and the time of his transportation after arraignment to the Washington County Jail, I find those circumstances after defendant was taken from the command post at Cossayuna leave a reasonable doubt as to the voluntariness of the oral and written statements made by the defendant during that period. The clear facts are defendant accompanied the State Police in the middle of the afternoon of July 25, from a public area at Beatty's

store, where he could freely communicate with others to an area where he came under full police custody and insulation from public contact. When voluntariness is in issue, as it is here, clear evidence of continued voluntariness throughout that period of police custody will be required by this court in the evaluation of suppression motions. Here, the evidence before the court shows only long continued detention and questioning without free access to family, friends, or the public. It further shows questioning, detention, transportation, and more questioning without normal rest or meals and I find that the defendant's status to the State Police during the period was more than that of a helpful witness in a missing persons case as evidenced by the various officers' testimony that defendant was to be retained in custody and transported and questioned without return to free public movement. It finally shows the statements which con-

fessed the crimes charged were obtained about 12 hours after defendant was taken into this restricted custody in state police controlled buildings in the late afternoon and evening and early morning hours of July 25 and 26, and under the other aforementioned facts and circumstances.

I find the defendant's statements after he was taken from the Cossayuna command post should be suppressed as the result of coercion by attrition on examination of the totality of circumstances (People v. Holder, 45 AD 2nd 1029 (60); People v. Anderson, 46 AD 2nd 150).

I do not find the statements prior to that time improper for admission in evidence as I find defendant's participation voluntary, with proper Miranda warnings, and unaffected by the voluntary participation in a polygraph exam. (People v. Wilson, 78 Misc. 2nd 468).

As to those items of physical evidence discov-

ered as a result of defendant's statements directing the State Police to specific physical items after he was taken from Cossayuna and before arraignment, I find their admission should be suppressed as tainted "fruit of the poisoned tree". (Wong Sun v. United States, 371 U.S. 471). The evidence was that the police located those items as a direct result of defendant's statements and not as a result of a general continuing investigation.

Defendant's motion is granted to the extent herein set forth.

It is further ordered that these papers and all proceedings had thereon be sealed and that there shall be no publication of this decision and any orders made thereon prior to the case being submitted to the jury or until the indictments of the defendant are disposed of.

Dated: July 2, 1975 signed: Julian V.D.Orton

APPENDIX C

Order of Washington County Court
July 7, 1975

At A Special Term of the County Court held in and for the County of Washington at the Courthouse in the Village of Salem, New York, on the 7th day of July, 1975.

PRESENT: HON JULIAN V.D. ORTON, JUDGE

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiffs,

-against-

KENNETH ARNOLD YARTER, JR.,

Defendant.

The defendant, Kenneth Arnold Yarter, Jr., having moved this Court for an order pursuant to Section 710.20 of the Criminal Procedure Law to suppress written and oral statements made by the defendant to New York State Police investiga-

tors and certain physical evidence obtained by said New York State Police, and the defendant having presented motion papers to the Court and the District Attorney of Washington County, Philip A. Berke, Esq., having presented responsive papers, and the Court having taken testimony upon the issues involved and having made findings of fact contained in a written Decision of the Court and upon motion of McMahon & McMahon, P.C., Attorneys for the defendant, Edward J. McMahon of counsel, it is

ORDERED that any statement of the defendant, Kenneth Arnold Yarter, Jr., written or oral made after he was taken from the Cossayuna command post of the New York State Police on July 25, 1974 and prior to his obtaining an attorney on July 26, 1974, be and the same hereby is suppressed, and it is further,

ORDERED that any and all physical evidence secured by the State Police or other agents of the

prosecution as a result of statements made after defendant was taken from the Cossayuna command post on July 25, 1974 and prior to his obtaining an attorney on July 26, 1974, be and the same hereby is suppressed and it is further,

ORDERED that this Order be sealed and there shall be no publication of this Order prior to the case being submitted to the jury or until the indictments of the defendant are disposed of.

Dated: July 7, 1975
Salem, New York

Signed: Julian V.D. Orton

APPENDIX D

District Attorney's Certificate that there is Insufficient Evidence to Proceed without Confession

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THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiffs,

-against-

KENNETH ARNOLD YARTER, JR.

Defendant.

Philip A. Berke
Washington County District Attorney
Attorney for Plaintiffs
Granville, New York

To:

McMahon & McMahon, P.C.
Attorneys for Defendant
16 Lake Avenue
Saratoga Springs, New York

Hon. Leon P. Putnam, Clerk
Washington County Court
Washington County Clerk's Office
Fort Edward, New York

The People of the State of New York, by the District Attorney of Washington County, assert pursuant to CPL § 450.50 that the deprivation of the use of the evidence which was ordered suppressed on July 7, 1975 by the Honorable Julian V. D. Orton, Washington County Judge, has rendered the sum of the proof available to the People with respect to the charges of Murder, in violation of § 125.25 (1) of the Penal Law of the State of New York and Rape in the First Degree, in violation of §130.35 of the Penal Law of the State of New York, and Rape in the Third Degree, in violation of §130.25 (2) of the Penal Law of the State of New York and Murder in violation of § 125.25 (3) of the Penal Law of the State of New York, previously filed by Indictment Number 2359 and the charge of Criminal Possession of a Controlled Substance in the Sixth Degree, in violation of § 220.06 (3) of the Penal Law of the State of New York, previously filed by Indictment

Number 2360, insufficient as a matter of law.

Signed: Philip A. Berke

Opinion of the Appellate Division of the Third Judicial Department.

50 A D 2d 1019

SUPREME COURT

APPELLATE DIVISION - THIRD JUDICIAL DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK,

Appellant,

v.

KENNETH ARNOLD YARTER, JR.,

Respondent.

December 23, 1975

Appeal from an order of the County Court of Washington County, entered July 7, 1975, which granted a motion by defendant to suppress evidence.

On Monday, July 22, 1974, Susan Carmel Zanta, aged 16, was discovered to be missing from a camp at Cossayuna Lake, in the Town of Argyle, Washington County, where she had been visiting. That evening, a missing person investigation by the Washington County Sheriff's Department and the New York State Police was commenced.

On Thursday, July 25, 1974 at about 3:00 P.M., the defendant, Kenneth Yarter, was approached by BCI Investigators Joseph Lewis and Robert Sanderson, who asked him to accompany them a short distance to their command post at Cossayuna Lake. The reason given was that the officers had heard that the defendant had seen Susan Zanta the previous Sunday morning. The defendant at first objected, but subsequently agreed and was taken to the command post. He remained there from about 3:00 P.M. to 8:00 P.M., during which time he was interviewed by several investigators.

During his initial questioning at the command post by Investigator Sanderson, defendant made a statement, subsequently reduced to writing, which indicated that he had seen Susan Zanta and one David Cole at his residence on Sunday evening, July 21, 1974. The statement further detailed the defendant's activities that evening and the next day. The defendant was then interviewed at the post by Investigator Phelan from about 4:15 P.M. to 7:30 P.M. and submitted to a polygraph examination conducted by Phelan, after signing a permission form. On the basis of the polygraph test, Phelan concluded that the defendant had information concerning the whereabouts of Susan Zanta. The County Court has found that defendant's submission to the polygraph examination was voluntary.

At approximately 8:00 P.M. on July 25, the defendant was transported by Investigators Lewis

and Denio from the command post to the State Police Barracks at Salem, New York, where he was kept until approximately 11:00 P.M. Questioned by Lewis and Denio, defendant made a statement that Susan Zanta came to him Sunday evening, July 21, and said she wanted to run away. The statement further indicated that defendant agreed to meet her the next day, that he met her at approximately 2:00 to 2:30 P.M. on July 22 at a designated store and drove her to Route 40, where she got out and that he last saw her hitchhiking south, supposedly to visit friends in Schenectady, although he allegedly stated first that she indicated she was going to Saratoga and Montreal.

The defendant was then taken from the Salem substation at 11:00 P.M. to the headquarters at Loudonville, and on the way, they picked up sandwiches which were eaten at Loudonville upon their

arrival at about 12:30 A.M. on the morning of July 26, 1974. Under interrogation by Investigator Weise, the defendant began at about 2:00 A.M. to make oral admissions, which were reduced to writing at about 4:00 - 4:30 A.M.

Defendant was then arrested at about 4:30 on July 26. He remained with several investigators until approximately 10:30 A.M., July 26, when he was taken to the office of Dr. Charles Cole for an examination, which was conducted in the presence of Investigators McCabe and Sanderson. Eventually, between 11:00 A.M. and 12:00 noon on July 26, defendant was taken to Greenwich Village Justice Loris Thompson, before whom he was arraigned. He was then transferred to the Washington County Correction Facility in Salem.

Following defendant's indictment at the September 1974 term of the Washington County Grand Jury for murder, rape in the first degree, rape in the

third degree and criminal possession of a controlled substance, defendant moved pursuant to section 710.20 of the Criminal Procedure Law for an order to suppress written and oral statements made by defendant to the State Police, and certain physical evidence obtained by them as a result of such statements. Defendant complained that he was continuously interrogated, not allowed to sleep, not adequately fed, denied counsel, and beaten and kicked to the point where he made an involuntary and false statement concerning Susan Zanta's death. It is urged by the defense that there are a number of discrepancies between defendant's admissions and the alleged true facts of the manner and place of commission of the crime. We need not discuss the merits of this claim for purposes of this appeal.

A number of officers of the State Police testified at the suppression hearing, and all denied

having inflicted or witnessed any physical abuse upon defendant. Defendant testified that he was punched in the head, bloodying his nose, by an officer who had not testified and whom he could not identify, and that later on four or five men out of uniform, some of whom he physically described but whom he could not identify and who had not testified, had taken turns, in teams of two, holding his hair and punching and kneeing him. He admitted that he had not been struck by any of the officers who did testify.

Investigator Lewis testified that defendant's nose was bleeding during the trip from the arraignment court to the Washington County Jail. Ralph Yarter, the defendant's brother, and a Washington County Deputy Sheriff, as well as two other Deputies, Spezio and Deyette, all testified that defendant had black and blue marks on his back when they saw him at the Washington County Jail on

July 26 and 27. Dr. Felmly, the Washington County Jail Physician, examined the defendant on July 27 and noted in the jail log that defendant had many discolored marks of assorted sizes on his body. Dr. Young examined the defendant at the jail on July 29 and found multiple contusions in the area of the left groin, shoulder blade and right knee. However, Dr. Cole, who examined defendant prior to arraignment, found no such marks or bruises. The prosecution, through cross-examination of the defendant and the testimony of other witnesses, raises the suggestion that these injuries may have been self-inflicted after defendant's arrest or the result of an accident suffered by defendant at an earlier time. All three doctors indicated that defendant's injuries could be consistent with a history of beating as well as with other causes.

No citation of authority is required for the pro-

position that the burden of proving the voluntariness of a confession rests with the People. The County Court, in granting the motion to suppress, noted the evidence of physical abuse but made no actual findings of fact one way or the other on this issue. Instead, the Court found that while defendant had voluntarily submitted to a polygraph test, his "statements after he was taken from the Cossayuna command post should be suppressed as the result of coercion by attrition on examination of the totality of circumstances." Moreover, in so doing the Court gave inordinate weight to the delay in arraignment following the confession. Such post-confession delay has no direct bearing upon voluntariness (People v. Kenyon, 35 A D 2d 749), except insofar as in the present case events occurring during that period of delay may corroborate other facts. This would ordinarily leave for our consideration the question of whether a finding of involuntariness

would be warranted based on the delay prior to the statement, but such an inquiry could only be made by ignoring the issue which should have overwhelming significance, to wit, whether defendant was in fact subject to physical abuse. If this question had been resolved by the County Court in defendant's favor, no other criteria would need be considered, but since the issue has not been decided we are of the opinion that determination of this appeal should be withheld.

Section 710.60 of the Criminal Procedure Law mandates the court hearing a motion to suppress to "make findings of fact essential to the determination" of issues raised by the motion. Accordingly, the action should be remitted to the hearing court for the purpose of rendering written findings on the issue of whether the defendant was subjected to physical abuse. A further hearing is not required.

Determination of appeal withheld, and matter

remitted to the County Court of Washington County for the making of further findings.

GREENBLOTT, J.P., KOREMAN and REYNOLDS, JJ., concur; SWEENEY and MAIN, JJ., dissent and vote to affirm in the following memorandum by SWEENEY, J.

SWEENEY, J. (dissenting).

We are unable to agree with the majority that a resolution of this appeal necessitates a remittal to the County Court for a specific finding on the issue of physical abuse. While the record is lengthy, the issue to be decided is a narrow one and the applicable law firmly established. In our view, the question is whether on this record the County Court could, from a consideration of the totality of the circumstances, properly conclude that the People failed to meet their burden of establishing voluntariness beyond a reasonable doubt. In determining this question our review is limited to

whether there is sufficient evidence to support the County Court's conclusion. (People v. Boone, 22 N Y 2d 476.) The question is one of law. (People v. Leonti, 18 N Y 2d 384). The majority has amply narrated the pertinent facts.

The majority concludes that the County Court gave inordinate weight to the delay in arraignment following the confession and that CPL 710.60 mandates findings of fact. While this statute does require the court to make findings of fact essential to its determination, the failure to do so does not preclude appellate review where, as here, the question is one of law (see e.g., People v. Russo, 45 A D 2d 1040; People v. Denti, 44 A D 2d 44). The requirement, in our view, is satisfied if the court recites the facts upon which it relied in granting or denying the motion (People v. Manguso, 24 A D 2d 539; People v. Ingram, 23 A D 2d 882). Clearly such practice was followed here.

Although the County Court may have given significant weight to the post-confession delay in arraignment, a reading of its decision demonstrates that the court applied the test of "the totality of the circumstances" (see People v. Chaffee, 42 A D 2d 172), and that it concluded the defendant's statement was the result of coercion by attrition (see People v. Holder, 45 A D 2d 1029). Undoubtedly a finding that defendant was subject to physical abuse would conclude the matter (see People v. Valerius, 31 N Y 2d 51); it does not follow, however, that absent such a specific finding this court may not review all the evidence to determine whether the totality of the circumstances leaves a reasonable doubt as to the voluntariness of the of the statements. The essential point is that the testimony of the doctors and the members of the Sheriff's Department creates a reasonable doubt concerning voluntariness, not whether it

proves conclusively that there was physical abuse.

The record reveals that defendant was detained for some 12 hours before the inculpatory statements were made, was continuously moved about and interrogated by different officers, had little rest or food and no contact with his family or the public, and was subjected to the possible psychological impact of the polygraph examination. More importantly, the testimony is overwhelming that defendant had bruises and marks consitent with his claims of beatings, which were unexplained by the People. Furthermore, the voluntariness is questionable because of the unusual situation that many of the facts set forth in the confession are concededly not true. Since the record establishes these facts, there is no need for remittal for further conclusions, Collectively these factors constitute sufficient proof to substantiate the County Court decision

that voluntariness was not proved beyond a reasonable doubt (U.S. ex rel. Wade v. Jackson, 256 F. 2d 7; People v. Anderson, 46 A D 2d 150; People v. Holder, 45 A D 2d 1029, supra) and the decision should be affirmed.

APPENDIX F

Opinion of Washington County Court
February 5, 1976

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff

-against-

KENNETH ARNOLD YARTER, JR.,

Defendant

JULIAN V. D. ORTON, J. The defendant, Kenneth Arnold Yarter, Jr., was indicted at the September, 1974 term of the Washington County Grand Jury on two counts of murder, rape in the first degree, and rape in the third degree under indictment #2359, and criminal possession of a controlled substance in the sixth degree under indictment #2360.

He moved pursuant to Section 710.20 of the Criminal Procedure Law of the State of New York to suppress written and oral statements and certain physical evidence and after extensive hearings I rendered my decision on July 2, 1975 finding that statements made after a polygraph interview on July 25, 1974 and prior to obtaining an attorney on July 26, 1974 and physical evidence secured as a result of those statements should be suppressed. This decision was appealed to the Appellate Division, Third Department and after hearing arguments and reviewing the record a majority of that court by a decision dated December 23, 1975 remitted the case to this court "for the purpose of rendering written findings on the issue of whether the defendant was subject to physical abuse", two justices dissenting.

This decision is made in response to the majority decision.

One of the circumstances which I considered in rendering my original decision, and I herein recite, was my determination that the defendant did sustain physical injury during the time he was in State Police custody on July 25 and 26, 1974. The testimony and record satisfied me that the defendant had no obvious injuries and did not complain of injuries when he was first taken into police surroundings. The testimony was that after arraignment defendant was taken to the Washington County Correctional Facility at Salem. After admission, he slept for a period of time during which he was under almost constant Sheriff's department observation. Upon awakening, he complained to a deputy he was acquainted with, and marks were observed on defendant's body by him at that time. The testimony of Doctors Cole, Felmly and Young about their findings on physical examination of the defendant, and the marks and areas of

tenderness Dr. Felmly and Dr. Young found on his body and the pathology of the development of those marks as testified to by the doctors, caused me to determine that they were the result of trauma to defendant's body incurred during the interrogation period.

The defendant's examination included testimony that he sustained physical injury during interrogation at Loudonville from abuse by four or five men out of uniform for a period of time. I did not find, however, his recitation credible because of the conflict between his allegations and the testimony of the police officers. The police officers gave an accounting of the time elapsed during this period of interrogation which was not contradicted, and which was not consistent with the time required for this episode of abuse as testified to by the defendant which appeared to be an episode of some duration. Further, the chronology of the testimony

of the officers who testified was that at least one of them, not always the same person, was with the defendant at all times during this period. Finally, the defendant related definite physical mistreatment by the men out of uniform, and this testimony was not consistent with the doctors' testimony which did not reflect harsh trauma or severe injury to his body, although it was noted that the defendant appeared to have a low threshold of pain.

On the other hand, the police officers who testified related nothing explaining the existence of the marks and other injury on defendant's body reported by the doctors, and this was not consistent with their existence and especially so when the defendant was under constant police supervision from the middle of the afternoon of July 25 until he was delivered to the correctional facility on July 26.

Evaluation of the evidence did not seem to warrant the application of the rule of cases finding

abuse on the physical evidence (see People v. Barbato, 254 N.Y. 170, where the physical symptoms were significantly present), especially when the People raised questions of other possible sources of the injuries.

I therefore could not make a decision on physical abuse alone and on evaluation of the circumstances surrounding the detention and interrogation, including physical injury, I was left with a reasonable doubt as to the voluntariness of defendant's statements made after the polygraph examination and before he obtained an attorney.

I therefore find that the defendant sustained physical injury which resulted in marks and areas of tenderness on his body during the time he was in State Police custody on July 25 and 26, 1974 and that such injuries were the result of trauma to defendant's body incurred during the interrogation period which were not explained by the People, as

I have set forth in this decision. However, on the weight of evidence of the physical facts, I cannot make a more conclusive, specific finding as to physical abuse on this review of the evidence than I was able to make at the time of my original decision.

Dated: February 5, 1976

Signed: Julian V. D. Orton

APPENDIX G

Opinion of the Appellate Division of the Third Judicial Department.

51 A D 2d 835

SUPREME COURT

APPELLATE DIVISION - THIRD JUDICIAL DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK,

Appellant,

v.

KENNETH ARNOLD YARTER, JR.

Respondent.

February 19, 1976

Appeal from an order of the County Court of Washington County, entered July 7, 1975, which granted a motion by defendant to suppress evidence.

By order entered July 7, 1975, a motion by defendant to suppress evidence was granted. By decision dated December 23, 1975, a majority of this court voted to withhold determination of an appeal from said order and remitted the matter to the County Court of Washington County for additional findings. Two Justices, in dissent, voted to affirm the order appealed from. The pertinent facts and the issues raised are fully set forth in our prior determination and need not be repeated at this time. By written decision dated February 5, 1976, the County Court of Washington County has set forth additional findings as required. The County Court has now found that marks on the defendant's body "were the result of trauma to defendant's body incurred during the interrogation period" and that "the police officers who testified related nothing explaining the existence of the marks and the other injury on defendant's body ***

and this was not consistent with their existence and especially so when the defendant was under constant police supervision from the middle of the afternoon of July 25 until he was delivered to the correctional facility on July 26."

In People v. Valletutti (297 N.Y. 226) and in People v. Barbato (254 N.Y. 170, 176), the rule is set forth that where evidence indicates that a defendant has somehow sustained physical injury while in the custody of public officials, the prosecution bears the burden of accounting for the defendant's condition, and in the absence of a satisfactory accounting, admissions made during such custodial period cannot be found voluntary beyond a reasonable doubt. Denials of mistreatment by the police officers involved are insufficient to satisfy the People's burden of proof. (People v. Valletutti, supra, p. 230.)

The findings by the County Court that the pres-

ent defendant sustained injuries as the result of trauma while in the custody of police is amply supported by the weight of the evidence, and is affirmed. The People have failed to satisfactorily explain the defendant's condition. We therefore affirm the determination of the County Court that the voluntariness of defendant's admissions has not been established beyond a reasonable doubt.

Order affirmed.

GREENBLOTT, J.P., SWEENEY, KOREMAN, MAIN and REYNOLDS, JJ., concur.

APPENDIX H

Order of the Appellate Division of the Third Judicial Department

SUPREME COURT

APPELLATE DIVISION - THIRD JUDICIAL DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK,

Appellant,

-against-

KENNETH ARNOLD YARTER, JR.,

Respondent.

February 24, 1976

PRESENT:

HON. LOUIS M. GREENBLOTT, Justice Presiding,
HON. MICHAEL E. SWEENEY
HON. HAROLD E. KOREMAN
HON. ROBERT G. MAIN
HON. WALTER B. REYNOLDS,
Associate Justices

The People of the State of New York having appealed from an Order of the County Court of Washington County, entered on the 7th day of July, 1975, in the Office of the Clerk of the County of Washington, and said appeal having been presented during the above-stated term of this Court, and having been argued by Philip A. Berke, Esq., of counsel for appellant, and by Edward J. McMahon, Esq., of counsel for respondent, and, after due deliberation, the Court having rendered a decision on the 19th day of February, 1976, it is hereby

ORDERED that the said Order of the County Court of Washington County suppressing evidence be and the same hereby is affirmed.

DATED AND ENTERED: February 24, 1976

Signed: John J. O'Brien
Clerk

APPENDIX I

Opinion of the New York State Court of Appeals
February 10, 1977

41 N.Y. 2d 830

THE PEOPLE OF THE STATE OF NEW YORK,

Appellant,

vs.

KENNETH ARNOLD YARTER, JR.,

Respondent.

Argued January 5, 1977 Decided February 10, 1977

APPEAL, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Third Judicial Department, entered February 24, 1976, which affirmed an order of the Washington County Court (JULIAN V. D. ORTON, J.), granting defendant's

motion to suppress evidence. Defendant was charged with rape in the first degree and murder, arising out of the death of a 16-year-old girl. In support of the motion to suppress written and oral statements made to the police and physical evidence seized by them as a result of such statements, defendant alleged that he was beaten and kicked to the point where he made false and involuntary statements. The Appellate Division stated that the finding by County Court that defendant sustained injuries as the result of trauma while in police custody was amply supported by the weight of the evidence; that the People failed to satisfactorily explain the defendant's condition, and that the voluntariness of defendant's admissions was not proven beyond a reasonable doubt.

Thomas E. Mercure, District Attorney for appellant.

Edward J. McMahon for respondent.

MEMORANDUM. The order of the Appellate Division should be affirmed.

The County Court suppressed certain oral and written statements made by defendant, as well as certain physical evidence secured as the result of these statements. The findings made by and the determination of the County Court have been affirmed by the Appellate Division. These findings are binding upon this court and, thus, we are required to accept them (NY Const, art VI, § 3; People v Rizzo, 40 NY2d 425, People v. Leonti, 18 NY2d 384; Cohen and Karger, Powers of the New York Court of Appeals, §198, p 742).

Given these findings beyond review, we are unable to say as a matter of law that the People have sustained their burden of proving beyond a reasonable doubt that these statements were made voluntarily (People v Huntley, 15 NY2d 72). Hence, the order of the Appellate Division must be affirmed.

Chief Judge BREITEL and Judges JASEN, GABRIELLI, JONES, WACHTLER, FUCHSBERG and COOKE concur.

Order affirmed in a memorandum.